

APPEAL NO. 060834
FILED JUNE 14, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 16, 2006. The hearing officer resolved the disputed issues by deciding that the Texas Department of Insurance, Division of Workers' Compensation (Division) did not abuse its discretion in appointing Dr. K, as a designated doctor and that the appellant (claimant) waived the right to object to the appointment of Dr. K as the designated doctor. The claimant appealed, arguing that the hearing officer should not have added the issue regarding waiver and disputing the wording of the issue added. Additionally, the claimant disputed the determination that he waived the right to object to the appointment of Dr. K as the designated doctor as well as the determination that the Division did not abuse its discretion in appointing Dr. K as the designated doctor. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The facts of this case are largely undisputed. The parties stipulated that on September 26, 2003, the claimant was examined by Dr. K for a carrier requested independent medical examination; that Dr. K was appointed by the Division as a designated doctor and examined the claimant on December 12, 2003; that Dr. K submitted a report on December 31, 2003, assigning an impairment rating of 2%; and that the claimant disputed the appointment of Dr. K as the designated doctor on July 27, 2004. The sole issue at the CCH was whether the Division abused its discretion in appointing Dr. K as a designated doctor. The carrier requested that an issue be added regarding whether the claimant waived the right to object to the appointment of Dr. K as the designated doctor.

APPOINTMENT OF DR. K AS DESIGNATED DOCTOR

28 TEX. ADMIN. CODE § 130.5(d)(2)(A) (Rule 130.5(d)(2)(A)) provides that if a designated doctor has been previously assigned, the [Division] shall use that doctor again, if the doctor is still qualified and available. Otherwise, the [Division] shall select the next available doctor on the [Division's] designated doctor list who has not previously treated or examined the injured employee within the past 12 months and has not examined or treated the injured employee with regard to a medical condition being evaluated in the designated doctor examination. As noted in Appeals Panel Decision (APD) 040982, decided June 18, 2004, similarly the Division has an obligation to get a qualified designated doctor for the initial examination. Further, Rule 130.5(d)(2)(B) references Rule 180.21 with regard to disqualifying associations. Rule 180.21(n)(2) provides that a disqualifying association is any association which may reasonably be perceived as having potential to influence the conduct or decision of the designated doctor.

In APD 022577, decided December 2, 2002, the hearing officer's determination of a disqualifying association was upheld on appeal where the required medical examination (RME) doctor and the designated doctor shared the same office space and telephone line. In that case, the RME doctor's conduct and comments to the claimant at the examination and the claimant's complaint against the RME doctor were also taken into consideration. In the instant case the stipulations of the parties reflect that Dr. K examined the claimant for his compensable injury in a carrier requested independent medical examination and as a designated doctor within a three-month period. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. See Morrow v. H.E.B. Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer's determination that the Division did not abuse its discretion in appointing Dr. K as a designated doctor is reversed and a new decision rendered that the Division did abuse its discretion in appointing Dr. K as a designated doctor.

ADDITION OF THE WAIVER ISSUE

One issue was reported out of the benefit review conference (BRC) report: "Was [Dr. K] properly appointed as the designated doctor in accordance with § 408.0041 and Rule 130.5?" The BRC report noted that the carrier's position was that Dr. K was properly appointed as the designated doctor and that the claimant should have objected to being seen by Dr. K prior to the designated doctor's examination. Within eight days of the BRC, the carrier filed a response to the BRC report requesting the addition of the issue regarding whether the claimant waived the right to object to the appointment of Dr. K as the designated doctor. Rule 142.7 provides how issues may be added. The hearing officer found good cause for adding the waiver issue as requested by the carrier, noting in his discussion that it was discussed at the BRC and raised in the carrier's response to the BRC report. We have reviewed the record and we perceive no abuse of discretion on the part of the hearing officer granting the request to add the issue. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow, *supra*.

WAIVER OF OBJECTION TO THE APPOINTMENT OF DR. K

The claimant contends that the hearing officer erred in deciding that the claimant waived the right to object to the appointment of Dr. K as a designated doctor. We agree. In APD 022277, decided October 23, 2002, we stated as follows:

Under Rule 130.5(d)(2), the [Division] is charged with the responsibility of ensuring that a designated doctor is still qualified before scheduling an appointment with the designated doctor to reexamine the claimant. We find no authority for relieving the [Division] of its obligation in that regard, even if the party's challenge to the qualifications of the designated doctor comes after the results of the examination are known.

See *also*, APD 042589, decided December 8, 2004, and APD 040982, *supra*. The Division has the same obligation to ensure that a designated doctor is qualified for the

initial appointment. The hearing officer's determination that claimant waived the right to object to the appointment of Dr. K as the designated doctor is reversed and a new decision rendered that the claimant did not waive the right to object to the appointment of Dr. K as the designated doctor.

We reverse the hearing officer's determination that the Division did not abuse its discretion in appointing Dr. K as a designated doctor and render a new determination that the Division did abuse its discretion in appointing Dr. K as a designated doctor. We reverse the hearing officer's determination that the claimant waived the right to object to the appointment of Dr. K as the designated doctor and render a new determination that the claimant did not waive the right to object to the appointment of Dr. K as the designated doctor.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge